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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JAY DAVID PEPPLER,

Defendant and Appellant.

B276485

(Los Angeles County
Super. Ct. No. PA082723)

APPEAL from a judgment of the Superior Court of Los Angeles County. Hayden Zacky, Judge. Affirmed.

Law Office of Russell S. Babcock and Russell S. Babcock,
under appointment by the Court of Appeal, for Defendant and
Appellant.

Xavier Becerra, Attorney General, Gerald Engler, Chief
Assistant Attorney General, Lance E. Winters, Assistant
Attorney General, Mary Sanchez and Nima Razfar, Deputy
Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Jay David Peppler (defendant) appeals from the judgment entered after he was found in violation of his probation. He contends that two of his prior convictions should not have been used to enhance his sentence, because they were eligible for reduction to misdemeanors under Proposition 47.¹ He asks that this court declare the two prior convictions to be misdemeanors, and to modify his sentence accordingly, or in the alternative, to reverse the judgment due to ineffective assistance of counsel. As we do not have authority to grant Proposition 47 relief in the first instance, and the record on appeal does not support a claim of ineffective assistance of counsel, we affirm the judgment.

BACKGROUND

In 2015, defendant was convicted on a plea no contest to possession of a firearm by a felon with two prior convictions, in violation of section 29800, subdivision (a). Defendant admitted the two prior convictions, as well as four prior felony convictions which had been alleged as prior prison term enhancements pursuant to section 667.5, subdivision (b).² The prior convictions were a violation of Health and Safety Code section 11366.5, a violation of Health and Safety Code section 11377, a violation of Penal Code section 459, and another violation of Health and Safety Code section 11377. The trial court suspended imposition

¹ See Penal Code section 1170.18. All further statutory references are to the Penal Code unless indicated otherwise.

² As relevant here, section 667.5, subdivision (b), adds a one-year enhancement for each prior felony conviction that resulted in a prison term or jail custody imposed under section 1170, subdivision (h), unless the defendant has remained free of such custody and a felony conviction for a period of five years.

of sentence and placed defendant on formal probation for three years with specified terms and conditions.

In March 2016, defendant's probation was revoked after he admitted the violation of failing to report and for testing positive for methamphetamine. The trial court sentenced defendant to a total term of seven years in prison, comprised of the high term of three years, plus four one-year enhancements for each of the prior prison terms. The court suspended execution of the sentence and reinstated probation on the same terms and conditions, with the additional condition that defendant complete a one-year residential drug treatment program.

About three weeks later defendant was terminated from the drug treatment program and charged in another court with a misdemeanor. After his probation was preliminarily revoked, defendant moved to withdraw his no contest plea. The court denied the motion to withdraw the plea and set the matter for a probation violation hearing.

On July 1, 2016, after hearing evidence, the court found that defendant had possessed drugs and a methamphetamine pipe in violation of the terms of his probation. The prosecutor recommended that the suspended sentence be imposed. Defense counsel informed the court that two of defendant's prior offenses were either eligible for reduction to misdemeanors or had been reduced pursuant to Proposition 47, and asked that they be eliminated as enhancements. The trial court observed that the record did not show that the offenses had been reduced to misdemeanors. The court stated, however, that even if the prior convictions had been reduced, it would decline to strike them. The court noted a conflict in the appellate courts on the issue,³

³ See, e.g., *People v. Abdallah* (2016) 246 Cal.App.4th 736 (*Abdallah*); *People v. Valenzuela* (2016) 5 Cal.App.5th 449, review

and opined that Proposition 47 did not affect enhancements due to prison terms served for convictions which occurred before the passage of Proposition 47. The court terminated probation and ordered the execution of the previously imposed seven-year sentence.

Defendant filed a timely notice of appeal from the judgment.

DISCUSSION

Relying on *Abdallah*, defendant contends that if his two eligible prior convictions had been reduced to misdemeanors under Proposition 47, the trial court would not have been able to use them to enhance his sentence pursuant to section 667.5, subdivision (b). In *Abdallah*, the defendant's 2011 felony sentence was recalled under Proposition 47 (§ 1170.18, subd. (b)), and he was resentenced to a misdemeanor on that conviction; as the prior offense was no longer a felony conviction, the appellate court held that it could not be used as a prison prior to enhance the defendant's sentence on subsequent felony convictions. (*Abdallah*, *supra*, 246 Cal.App.4th at pp. 740, 747.)

Defendant acknowledges a conflict in the appellate courts on the question, but points out that those cases disagreeing with *Abdallah* are under review by the California Supreme Court, while *Abdallah* is not. Further, defendant asserts that this case is procedurally identical to *Abdallah*, because both he and the defendant in *Abdallah* were sentenced after Proposition 47 went into effect. Contrary to defendant's assertion, the two cases are not procedurally identical. Defendant's prior convictions have

granted March 1, 2017 (S239122); *People v. Williams* (2016) 245 Cal.App.4th 458, review granted May 11, 2016 (No. S233539); *People v. Ruff* (2016) 244 Cal.App.4th 935, review granted May 11, 2016 (S233201).

not been reduced to misdemeanors. Minimizing this distinction, defendant suggests that this court simply reclassify his two eligible convictions as misdemeanors, strike the two enhancements based upon them, and enter a modified sentence. As respondent demonstrates, this court does not have the authority to do as defendant asks, as he must first present a petition in the trial court to recall the sentence on his prior convictions. (*People v. Diaz* (2015) 238 Cal.App.4th 1323, 1327-1328; *People v. Shabazz* (2015) 237 Cal.App.4th 303, 313-314; § 1170.18, subd. (f).)

In the alternative, defendant contends that his counsel rendered ineffective assistance by failing to file a petition under Proposition 47 prior to sentencing in this case. The Sixth Amendment right to assistance of counsel includes the right to the effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-674; see also Cal. Const., art. I, § 15.) It is defendant's burden to demonstrate that trial counsel was inadequate and that prejudice resulted. (*People v. Vines* (2011) 51 Cal.4th 830, 875-876.) Prejudice is shown by "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington, supra*, at p. 694.)

We presume that counsel's tactical decisions were reasonable, unless "the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission." [Citation.] (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437.) "If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.]" (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.)

Defendant counters that counsel had no conceivable reason for failing to file a Proposition 47 petition, because it no doubt would have been granted. We disagree. Proposition 47 relief is not available to those who have had one or more disqualifying prior convictions of an offense enumerated in section 667, subdivision (e)(2)(c), or an offense requiring registration as a sex offender. (§1170.18, subd. (i).) Although two of defendant's prior convictions appear to qualify for Proposition 47 relief, the record does not show that defendant qualified for relief, as his complete criminal history does not appear in the record on appeal. Thus, despite defendant's unsupported conclusion that he "did not have any disqualifying serious or violent felony priors," he has not established that he qualified for relief under Proposition 47.

Counsel's reasonable tactical reason for not filing a Proposition 47 petition could have been that it would not have been meritorious. Counsel's failure to make a unmeritorious motion or request is not ineffective assistance. (*People v. Price* (1991) 1 Cal.4th 324, 387.) Further, as defendant cannot demonstrate on this record that he qualified for Proposition 47 relief, he has not met his burden to show prejudice -- a reasonable probability that the result would have been different. (See *Strickland v. Washington, supra*, 466 U.S. at p. 694.) Thus, defendant's ineffective assistance claim fails on direct appeal.

DISPOSITION

The judgment is affirmed.

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_____, Acting P. J.
CHAVEZ

We concur:

_____, J.
HOFFSTADT

_____, J.*
GOODMAN

* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.